United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7473

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

BOISE CASCADE CORPORATION,

Plaintiff-Appellant,

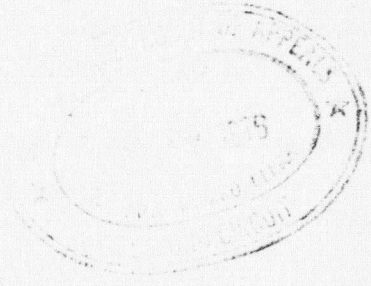
- against -

E. TODD WHEELER and THE PERKINS & WILL PARTNERSHIP,

Defendants-Respondents.

B
P/S

To be argued by
Louis H. Willenken



APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6072 (LFM)

REPLY BRIEF FOR APPELLANT

REID & PRIEST
Attorneys-at-Law
40 Wall Street
New York, N. Y. 10005
212 344-2233

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Reply Argument

Perkins & Will has a series of arguments concerning whether the claim was or could be properly assigned which we believe avoid the real question.

Perkins & Will insists that the record is clear that Kidde never assigned the claim. Boise has consistently taken the position that it is the owner of the claim as a result of the February 1973 Sale Agreement, that such a transfer or retaining of the claim is authorized by Harry R. Roeder, Inc. v. Roeder, 236 App. Div. 87, 258 N.Y.S. 44 (1932), and that such transfer is valid although not referred to as an assignment.

If Kidde had merged into Boise, there would be no question of Boise's interest in the claim, although still no assignment. If an individual has an asset which goes to another by will or intestate succession, there is a transfer but no assignment. All changes in ownership are not assignments. Here, the February 1973 Sale Agreement provided for ownership of the claim by Boise and it is respectfully submitted that the effect of that agreement is the only true issue on appeal.

Perkins & Will argues that the non-assignment clause in the contract between Kidde and the Owner prohibits the assignment of any claim by Kidde against Perkins & Will. This

argument is not correct because such non-assignment clauses do not prohibit assignments of choses in action:

> "Even though an executory contract may be nonassignable because of its personal nature, because of a provision therein for nonassignment, or for other reasons, after an event which gives rise to a liability on the contract, the reason for the rule disappears and the cause of action arising under the contract is assignable. Thus, as indicated elsewhere, claims for money due under a contract which is nonassignable because of its personal nature may be assigned to a third person and enforced by the assignee." (footnotes omitted) 6 Am. Jur. 2d §33

> "A stipulation against assignment does not preclude an assignment of a cause of action for damages for breach of the contract. It has also been held that a stipulation in a contract against assignment without consent does not prevent an assignment by operation of law, at least where the contract is not one of a personal nature. Furthermore, such a provision is generally inserted for the protection of the other party to the contract, and not to protect third parties." (footnotes omitted) 6 Am. Jur. 2d §22

In addition it should be noted that the non-assignment clause does not refer to claims against Perkins & Will; the Owner and Perkins & Will dealt with Boise (including the arbitration) as the owner of the claim; and while there has been a transfer of the claim, there has not been an assignment.

The Brief of Appellee states that Boise is required to prosecute claims in Kidde's name. Such a position is inconsistent with the only testimony on the question, that of Mr.

Dornbush, and is inconsistent with the affidavit of A. M. Kinney, Chairman of the Board of the present parent company of Kidde. Moreover, the argument acknowledges that it is Boise who is prosecuting the claims as the real party in interest, and accepts the February 1973 Sale Agreement which provides for ownership of the claim by Boise.

Arguments that Kidde is still in existence and no longer owned by Boise are correct and are again derived from the terms of the February 1973 Sale Agreement. However, neither directly addresses the question of whether such agreement validly provides that Boise have all benefit and burden of the claim.

There are a series of arguments apparently designed to affect credibility by indicating inconsistent positions. However, Boise's positions have not been inconsistent.

Perkins & Will shows how the amount of the claim changed. They do not mention that their designed sequence of work was not feasible and that throughout the project the sequence had to be altered and realtered at great cost (which resulted in constant increases in the claims). Moreover, Perkins & Will participated in discussions to revise the sequence and we believe the facts will show willfully attempted to shift the burden of designing the sequence of work, as well as other design problems, to the contractor.

Obviously, in a project which was completed in 1973, only a part of the design problem was known and had caused only

part of the total delay by 1971. Thus the 1971 claim is substantially less than the claim submitted in 1973 when the job was complete or near complete. Finally, Kidde attempted to arbitrate the cost of only one of the design sequence revisions in 1972. That design revision claim was based on one proposed change order (out of over 300 approved or proposed), the design was itself later revised, and the claim was naturally miniscule compared to the total damage caused by the maldesign and willful wrongdoing of Perkins & Will. The point is that the differences in the amount of claim are for different claims or parts of claims and not inconsistent positions on the value of the damages.

Perkins & Will points to the apparent inconsistency that Boise's Vice-President states that Kidde completed the project while Boise contends that Boise completed the project. As explained in our initial memorandum, there were two issues before the state court: (1) whether the arbitrator should be disqualified because of a prior contract with Boise and (2) whether Kidde violated the non-assignment clause in the contract with the owner because Boise now owned the claim.

Boise submitted to the state court the February 1973 Sale Agreement, the affidavit of Boise' Vice-President referred to by Perkins & Will and an October 15, 1974 affidavit of Emil Hansel, Jr., Project Manager for the project during 1973. As to whether the arbitrator should be disqualified, Boise submitted

facts and arguments showing that while Boise was the real party in interest, Kidde was the named claimant, past Kidde personnel completed the project and would be the witnesses in arbitration, Boise could remain in the background of the claim, and thus the arbitrator should not be disqualified for a prior contact with Boise which was not recent, nor continuing, nor substantial. As to whether Kidde violated the non-assignment clause, the arguments were made that Kidde completed the project as far as the owner was concerned although the owner knew that completion was at Boise's expense and under Boise's control (Emil Hansen's affidavit states that he met with representatives of the owner at the time of the February 1973 Sale Agreement and assured them that Boise would see to it that Kidde completed the contract. See index numbers 7335/72; 16122/72; 9281/75; 7803/75 and 8556/75 Supreme Court, New York County for the consolidated action in which the affidavit was submitted).

Boise's position on who is the real party in interest is thus consistent. Perkins & Will's heavy reliance of the arguments in the state court proceedings concerning whether Boise's position constituted a breach of the non-assignment clause rather than reliance on discovery of witnesses and documents in this proceeding only obscures the facts which were ellicited herein with the benefit of full discovery. i.e. The February 1973 Sale Agreement provides that Boise has the option to complete the project itself or have Kidde complete the project at Boise's expense and risk (Appendix pp 248 and 250); after February 2,

1973 the Kidde employees working on the project went directly on the Boise payroll and while they continued to use Kidde letterhead for correspondence, the owner and Perkins & Will thereafter corresponded with Kidde care of Boise or with Boise directly. (On p 312, 313 and 314 of the Appendix, the depositions of Mr. Sawyer, Vice-President of Kidde during the project, clearly shows that he and the other Kidde employees on the project went on the Boise payroll in February 1973, See also Appendix pp 100, 315-318, 329-331).

Activity of Kidde to complete the project after February 2, 1973 consisted of allowing its employees to complete the project on Boise payroll; allowing Boise to take control of the project (including prosecuting claims arising thereunder); allowing Boise to use Kidde's name for the project; and resolving that a Boise Associate General Counsel, Mr. Ganser, could act as Kidde Vice-President and use Kidde's name in fulfilling Kidde's obligations under the February 1973 Sale Agreement. Such activity was at Boise's expense, under Boise's control, and in effect done as Boise's agent as was necessitated by the February 1973 Sale Agreement.

Moreover, the brief of Perkins & Will refers to selected statements from the state court proceeding without referring to the multitude of statement by Boise's Vice-President, the Project Superintendent, the February 1973 Sale Agreement and Counsel for Perkins & Will that Boise has the benefit and burden of the claim,

Boise had control of the project after February 1973 and Boise is the real party in interest.

Similarly, while the February 1973 Sale Agreement provided that Boise would receive the net after tax proceeds of claims Boise took a more direct approach and paid the taxes itself (Appendix pp 297, 97-98).

Arguments that Kidde did not adhere to the February 1973 Sale Agreement are contrary to the Kidde resolution concerning that agreement, the testimony of Mr. Dornbush and Mr. Sawyer, the affidavit of A. M. Kinney, and arguments by Perkins & Will that counsel for Kidde are also counsel for Boise. See also p 48 of the Appendix that there was an interim agreement allowing Kidde to use its former offices which were leased by Boise.

Arguments about offices and residents of the parties are confusing since the testimony and record are clear that Perkins & Will is a New York citizen by virtue of the citizenship of its partners and that Boise is not a New York citizen by virtue of its incorporation in Delaware and its principal place of business in Boise, Idaho. (Appendix at p 64, Dornbush deposition). These arguments are irrelevant to this appeal because there was no dispute on these matters.

Perkins & Will contend that Boise is making the same claim in the arbitration as in the instant action and subjecting Perkins & Will to the possibility of double liability. This contention is wrong in several respects.

First, forcing Boise to join Kidde as a plaintiff will not affect the arbitration or change Perkins & Wills' exposure.

Second, this contention focuses on the question whether there is material difference in the claims in the arbitration and this action, rather than who is the real plaintiff. Boise's claims in the arbitration are against the Owner since cross-claims are not permitted in arbitration agreement. Perkins & Will has repeatedly emphasized this point below and in the arbitration, since Boise could not cross-claim against Perkins & Will in the arbitration, it had to institute this separate action. Furthermore, this action includes claims which are not arbitrable, e.g. misrepresentation and willful wrongdoing. Clearly, Perkins & Will ought to pay for misrepresentation and willful wrongdoing which caused damaged which are not recoverable as changes against the owner and are not arbitrable.

Third, Perkins & Will creates the illusion that it might have to pay twice for the same injury. However, the courts have demonstrated an ability to apportion damages, and there need be and should be no overlap. Perkins & Will can certainly introduce evidence of partial payment of any liability in either this court or the arbitration.

Fourth, Perkins & Will seeks to dismiss this action on the basis of what Boise might recover against the Owner. Why should Perkins & Will get away with millions of dollars of wrong-doing which otherwise might not be recoverable simply because there is a claim against the owner which overlaps and enables part recovery for that wrongdoing? Clearly, the architect here

had a duty to the contractor, can be sued in court and is responsible for all damages resulting from breach of that duty. U.S. v. Rogers & Rogers, 161 F. Supp. 132 (D.C. Cal. 1958); and A. R. Mager, Inc. v. Graham, 285 So. 2d 397 (Fla. 1973). This multiple liability argument seems to be part of the old lack-of-privity argument, which Perkins & Will attempts to resurrect through the back door. However, one of the reasons for dispensing with privity in New York was because the plaintiff might not be able to sue the intermediate party. Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y. 2d 5, 226 N.Y.S. 2d 363, 368-69 (1962).

The argument that all statements that Boise was the real party in interest are based on the representations of Boise's counsel in surprising. Counsel for Perkins & Will argued in state court that Boise was the real party in interest after seeing the February 1973 Sale Agreement (See, Supplemental Affidavit in Opposition, sworn to March 8, 1976 which is in Record but not Appendix and which addresses itself directly to this point). Even the argument that counsel in the arbitration making such representation were Boise's counsel recognizes that Boise is the real party in interest in that action. However, Boise's contention is based not on the representations of counsel but on the February 1973 Sale Agreement, the testimony of Mr. Dornbush and Mr. Sawyer, the correspondence between Boise and the owner and the affidavit of A. M. Kinney, among other things.

Perkins & Will lists cases standing for the proposition that the corporation is separate from its shareholders, except in the case of transfers of assets involving "one-man" corporations. At the outset, we agree that the corporation is separate from its shareholders, but believe that the sole shareholder can transfer corporate assets as more fully explained in our initial brief. Moreover, A. M. Kinney Inc. also transferred the claim by the February 1973 Sale Agreement, A. M. Kinney Inc. became then and is now the sole shareholder of Kidde, A. M. Kinney Inc. has A. M. Kinney as the Chairman of the Board, and A. M. Kinney Inc. is not a public corporation but rather in the nature of the "one-man" corporation as Perkins & Will uses it. Thus, A. M. Kinney Inc. had the authority to transfer and did transfer this claim to Boise.

Perkins & Will cites Torrey Del. v. Chautaugua Truck Sales & Serv., 366 N.Y.S. 2d 506 (4th Dept. 1975) which stands for the proposition that a merger is not a sale of corporate property. No attempt was made by the sole shareholder to sell, assign or otherwise transfer the property in the case and indeed the case shows by analogy that just as every transaction involving ownership is not a sale, every transaction involving ownership is not an assignment. Indeed, nowhere did the Torrey Del. court say that the merger was not effective, and it is clear

in that case that the surviving corporation became the owner of the property.

Respectfully submitted,

Reid & Priest
Attorneys for Plaintiff-
Appellant Boise Cascade
Corporation
40 Wall Street
New York, New York 10005

COPY RECEIVED
HART & HUME
ATTORNEYS FOR The Penfield Mill Co.

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